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In the Supreme Court of the United States

OCTOBER TERM, 1955

ROSCOE WAGNER, D/B/A WAGNER TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. pp. 10–11) is reported at 227 F. 2d 200. The Board's decision and order (R. 13–43)[1] is reported at 110 N. L. R. B. 1179.

JURISDICTION

The judgment of the court below was entered on December 30, 1955. The petition for a writ of certiorari was filed on March 20, 1956. The

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix *infra*, pp. 8–10.

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding, affirmed by the court below, that petitioner discharged an employee because of his union membership, in violation of Section 8 (a) (3) and (1) of the Act.

STATEMENT

A. The Board's Decision and Order

1. *The unfair labor practices.*—Early in 1954, petitioner's employees began to sign cards designating the Union[2] as their representative for collective bargaining purposes (R. 16, 21; 77–78). On various occasions during the first two months of that year, petitioner Roscoe Wagner, who manages the business, and his brother Roger Wagner, who acts as assistant manager, told the employees that if the Union's organizational campaign were successful, petitioner would sell all or part of his business (R. 20, 21, 22, 25–26, 36, 38; 63, 71, 78–

[2] General Teamsters, Warehousemen and Helpers Union, Local No. 483.

80, 88, 89, see pp. 4–5, *infra*); told one of the employees that certain fellow employees had been discharged for union activity (R. 18, 25, 37, 38; 62, see p. 4, *infra*); led the employees to believe that their union activities were under surveillance (R. 18, 20, 26, 36, 37; 61, 71, 89, 96, see p. 4, *infra*); and, in the context of such conduct, interrogated the employees regarding their union activity (R. 17–18, 20, 22, 26, 36–37; 61, 71, 79, 85, 88, see pp. 3–4, *infra*).[2]

Cecil Weyer, a truck driver in petitioner's employ, had been a member of the Union for about 15 years prior to his discharge (R. 17; 66). Early in February 1954, he signed a new union authorization card (R. 17; 60). According to Weyer's testimony, which was credited by the Trial Examiner and the Board, on February 16, 1954, the following events occurred: Roger Wagner interrupted a conversation among three of the drivers, including Weyer, by asking them, "How are you and the Union doing? * * * I hear you fellows are organized" (R. 17–18; 36; 61). Weyer replied that he knew nothing of it and, when Roger Wagner asked if he had not signed a union application blank, answered that it was unnecessary for him to do so as he had been a member for 15

[2] On the basis of the findings summarized above, the Board found that petitioner violated Section 8 (a) (1) of the Act by engaging in the conduct described. The court below affirmed this finding and petitioner does not challenge the propriety of the decision below in this respect.

years (R. 18, 23, 37; 61). At this point, Roscoe Wagner, who had overheard the exchange, called Weyer a "liar," pulled a piece of paper out of his pocket, held it up, and said, "I can tell you right where you signed this application and the day and everything, all about it" (*id.*). He then approached Weyer with doubled fist and threatened to "beat [Weyer's] head off" (*id.*). Weyer attempted to mollify Wagner, but Wagner announced, "I don't want to talk to a Communist. * * * I don't want no union man around here. They are just nothing but a bunch of Communists" (R. 18, 23, 37; 61–62). Roscoe Wagner then told Weyer that he, Weyer, was "going to resign" (R. 18, 23, 37; 62). When Weyer asserted that he would not do so, Roscoe Wagner instructed Roger Wagner to "fix up [Weyer's] resignation papers" (*id.*).

Roger Wagner then prepared, and Roscoe Wagner (but not Weyer) signed, a statement that Weyer had "left of his own free will" and that "his services as a truck driver have been satisfactory" (R. 18, 24, 37; 13, 62–63). Roger gave the statement to Weyer, saying, "I hate to see this, you have been one of our best drivers. You know how Roscoe feels about the union. You know what happened to Dick Gear and Bob Sauers and some more of them" (R. 18, 25, 38; 62). Roger added that "he wouldn't have a union man working for him and * * * he would sell every truck in the fleet if he had to" (R. 25;

63.) As his conversation with Roscoe had been unpleasant and contained the suggestion of bodily harm, Weyer took the letter and left (R. 18, 24, 37; 62, 64).

About April 30, 1954, petitioner offered to reemploy Weyer, but Weyer refused the offer (R. 19; 65–66).

Before the Board, petitioner asserted that Weyer was discharged because he had called petitioner Wagner a liar when the latter admonished him for allegedly having spent an inordinately long time at a stopover in Nevada and for the further reason that Weyer had given an equivocal answer when Wagner inquired about his union membership (R. 37–38). The trial examiner and the Board discredited petitioner's assertion that Weyer called him a liar (R. 38). The Board also concluded that petitioner's real reason for discharging Weyer was not the latter's equivocation with respect to his union membership, but rather the fact that Weyer had actually joined the Union and was an active member, and that Wagner seized upon his heated argument with Weyer as an excuse to rid himself of a union adherent (R. 38). Accordingly, the Board found that petitioner in discharging Weyer violated Section 8 (a) (3) and (1) of the Act.

2. *The Board's order.*—The Board's order (R. 39–41, 30–31) requires petitioner to cease and desist from the unfair labor practices found, or from in any other manner interfering with, re-

straining, or coercing his employees in the exercise of their statutory rights. Affirmatively, petitioner is required to make employee Weyer whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices.

B. The Opinion of the Court of Appeals

The court below enforced the Board's order in full. The court stated, in its *per curiam* opinion (Pet. p. 11):

> The sole argument here has to do with the sufficiency of the evidence in support of the unfair practice charges. While the evidence was conflicting, there was abundant testimony, not inherently incredible, to support the Board's findings on this point. Questions of credibility in such circumstances are for the examiner and the Board, not for us, to resolve.

ARGUMENT

Essentially, petitioner's case here, as in the court below, is that (Pet. 4–7, 8–9) the record as a whole does not support the Board's finding that Weyer was discharged because he had joined the Union and was an active member, rather than for the reasons assigned by petitioner. Petitioner's challenge to the substantiality of the supporting evidence presents no question warranting review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502–

503. Moreover, as the Statement shows and as the court below found, the Board's findings are adequately supported by the record as a whole.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Prevention of Unfair Labor Practices

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be

of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall

be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1955